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6 **UNITED STATES DISTRICT COURT**

7 **DISTRICT OF NEVADA**

8 RAYMOND G. HARNIST,

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9 Plaintiff,

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10 vs.

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11 COLONIAL BANK NA et al.,

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12 **ORDER**

13 Defendants.

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14 3:10-cv-00331-RCJ-VPC

15 This is a standard foreclosure case involving one property. The Complaint is a MERS-
16 conspiracy type complaint listing thirteen causes of action. The case is part of Case No. 2:09-
17 md-02119-JAT in the District of Arizona, and Judge Teilborg has remanded those parts of the
18 first, third, fourth, tenth, and eleventh claims that do not involve MERS. The wrongful
19 foreclosure claim remains with Judge Teilborg. Two motions to dismiss are pending before the
Court. For the reasons given herein, the Court grants the motions.

20 **I. THE PROPERTY**

21 Raymond G. Harnist gave lender Colonial Bank, N.A. (“Colonial”) a \$206,755
22 promissory note to purchase property at 51 S. Maddux Dr., Reno, NV 89512 (the “Property”).
23 (See Deed of Trust (“DOT”) 1–2, May 29, 2008, ECF No. 42-9); Note 1, May 29, 2008, ECF
24 No. 42-8). The trustee was Ticor Title Co. (“Ticor”). (See DOT 1). MERS assigned the Note
25 and DOT to BAC Home Loans Servicing, LP (“BAC”). (See Assignment, Oct. 8, 2009, ECF No.

1 42-10). Recontrust Co., N.A. filed the Notice of Default (“NOD”) based on a default of
2 unknown amount as of January 1, 2009. (See NOD 1–2, Oct. 7, 2009, ECF No. 42-12). BAC
3 substituted Recontrust as trustee. (Substitution, Oct. 8, 2009, ECF No. 42-11). Plaintiff waived
4 or failed to request mediation under the state Foreclosure Mediation Program (“FMP”). (See
5 FMP Certificate, Apr. 29, 2010, ECF No. 42-13). Recontrust noticed a sale for June 11, 2010.
6 (Notice of Trustee’s Sale (“NOS”), May 21, 2010, ECF No. 42-14).

7 **II. ANALYSIS**

8 The wrongful foreclosure claim remains with Judge Teilborg. The remanded claims are:
9 (1) Unfair Lending Practices Under Nevada Revised Statutes (“NRS”) section 598D.100; (3)
10 Injunctive Relief; (4) Declaratory Relief; (10) Civil Conspiracy; and (11) Racketeering Under
11 NRS section 207.470.

12 First, Plaintiff obtained the loan on May 29, 2008. The statute of limitations under
13 section 598D.100 is three years, *see* Nev. Rev. Stat. § 11.190(3)(a), and the present case was
14 brought on April 19, 2010. Therefore, the claim is not time-barred. Section 598D.100 was
15 amended in 2007, with an effective date of June 13, 2007. *See* 2007 Nev. Stat. 2844–46.
16 Therefore, the current version of the statute applies to the present case. The statute provides a
17 civil action to a borrower against a lender who “[k]nowingly or intentionally make[s] a home
18 loan, other than a reverse mortgage, to a borrower, including, without limitation, a low-document
19 home loan, no-document home loan or stated-document home loan, without determining, using
20 any commercially reasonable means or mechanism, that the borrower has the ability to repay the
21 home loan.” Nev. Rev. Stat. § 598D.100(1)(b). Plaintiffs must “alleg[e] specific facts showing
22 how Defendants failed to adhere to this statutory requirement” *Urbina v. Homeview*
23 *Lending, Inc.*, 681 F. Supp. 1254, 1259–60 (D. Nev. 2009) (Hunt, C.J.) (dismissing a claim
24 under the statute).

25 Much of this claim is conflated with the conspiracy claims, which is why only part of it

1 has been remanded. In the remanded part of the claim, Plaintiff alleges that the loan payments
2 exceeded 40% of his income as reported to the lender, and that the lender failed to verify his
3 income. (See Compl. ¶¶ 54, 57, Apr. 19, 2010, ECF No. 1-1). Although Plaintiff's allegations
4 implying that he incorrectly stated his income on the loan application documents may open him
5 up to a charge of mortgage fraud, the allegations that the lender accepted the stated income
6 amount without verification and that the lender knew that the mortgage payments would equal
7 40% of Plaintiff's income even as stated supports a civil claim under section 598D.100 that the
8 lender failed to determine in a commercially reasonable manner that Plaintiff was able to repay
9 the loan from his income or other sources apart from anticipated gains in equity. The Court
10 would therefore not dismiss this claim as against Colonial Bank, but Colonial Bank has not
11 moved against it. The Court will dismiss the claim as against the moving parties.

12 Second, the civil conspiracy claim fails because Plaintiff does not allege any agreement
13 to engage in unlawful activity. He simply concludes that a conspiracy existed between the
14 lender and others because these agencies were all in some way involved with foreclosures
15 generally. The claim is not pled with nearly the particularity required under Rule 9(b). The
16 Court will dismiss this claim.

17 Third, under Nevada's RICO statute, a private party can bring a civil action for treble
18 damages, attorney's fees, and costs for injuries sustained by a violation of NRS section 207.400.
19 See Nev. Rev. Stat. § 207.470. Plaintiff alleges Defendants engaged in racketeering. Plaintiff,
20 however, nowhere identifies which unlawful act under section 207.400 he believes Defendants to
21 have committed. Plaintiff simply quotes the definition of "racketeering" under section 207.390
22 and alleges that Defendants engaged in racketeering through predatory lending practices.
23 Plaintiff has not identified two predicate offenses required to constitute racketeering. See *id.*
24 § 207.390. Such crimes include murder, manslaughter, mayhem, certain batteries, kidnapping,
25 sexual assault, arson, robbery, extortion, seduction, forgery, burglary, grand larceny, bribery,

1 assault with a deadly weapon, certain frauds, etc. *See id.* § 207.360. Insofar as the predicate acts
2 are intended to be frauds based on the MERS system, the claim remains with Judge Teilborg.
3 The Court will dismiss this claim insofar as it has been remanded.

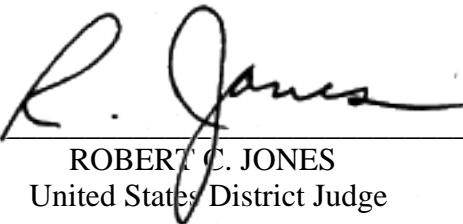
4 Finally, the claims for injunctive and declaratory relief will be dismissed as against the
5 moving Defendants.

6 **CONCLUSION**

7 IT IS HEREBY ORDERED that the Motions to Dismiss (ECF Nos. 42, 54) are
8 GRANTED. Because the claims remain with Judge Teilborg, the Court makes no ruling on the
9 wrongful foreclosure claim or the injunctive and declaratory relief claims insofar as those claims
10 relate to the wrongful foreclosure claim. *See* Nev. Rev. Stat. § 107.080 (procedurally improper
11 foreclosure); *Collins v. Union Fed. Sav. & Loan Ass'n*, 662 P.2d 610, 623 (Nev. 1983)
12 (foreclosure absent default).

13 IT IS SO ORDERED.

14 Dated this 24th day of August, 2011.



15 ROBERT C. JONES
16 United States District Judge
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